

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

FILED
08/24/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: Julie Cristiani
43B-0832-R-2023
Lambert, Kathryn
9.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Eightmile Creek PV Ranch LLC

CASE 43B-0832-R-2023

43B 190470-00
43B 190471-00
43B 190478-00
43B 30160047

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claim 43B 190470-00 appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 4560 TIMES THE CAPACITY OF THE RESERVOIR.

Claim 43B 190471-00 appeared in the Preliminary Decree with the following issue

remark:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 1039 TIMES THE CAPACITY OF THE RESERVOIR.

Claim 43B 190478-00 appeared in the Preliminary Decree with the following issue

remark:

THIS CLAIM APPEARS TO BE CLAIMING TWO SEPARATE SOURCES OF WATER. MORE THAN ONE WATER RIGHT MAY BE INVOLVED.

The issue remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimant an opportunity to file additional information or evidence. The February 17, 2023 Order Consolidating Case And Setting Deadlines Pursuant To Section 85-2-248(5), MCA set various deadlines for the claimant and the Montana Department of Natural Resources And Conservation [“DNRC”] to resolve the issue remarks. The June 5, 2023 DNRC Memorandum makes recommendations concerning the volume for claims 43B 194070-00 and 43B 194071-00, and confirms it appears an implied claim should be generated from claim 43B 190478-00. On July 6, 2023 and August 10, 2023 the claimant filed Status Reports which contain its responses to the DNRC Memorandum and provide additional information supporting resolution of the issue remarks. These settlement documents are viewable in the Court’s FullCourt Enterprise case management system.

APPLICABLE LAW

“All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section.” Section 85-2-248(2), MCA.

“‘Implied Claim’ means a claim authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights.” Rule 2(a)(33), W.R.C.E.R.

From Case 41P-108 “Circle S Ranch, Inc.” ORDER ON MOTION TO MODIFY CLAIMS 5-16-19, at 2019 Mont. Water LEXIS 8, page 5.

The Water Court recognizes implied claims in certain circumstances *In re Musselshell River below Roundup*, Case 40C-47, 1994 Mont. Water LEXIS 18, *78

(July 14, 1994). However, before the Court will recognize an implied claim, the claimant must prove that several factors exist. These include: (1) proof of two or more water rights in the original claim form or the material submitted with the claim form; (2) proof of historic use corroborating the implied claim; and (3) proof that recognizing the implied claim(s) will avoid causing a change to historic water use or increase the historic burden to other water users. *In re Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, *32 (Jan. 31, 2013); *In re Martinell*, Case 41A-148, 2018 Mont. Water LEXIS 3, *6 (June 14, 2018). These standards assure that implied claims are not used to revive a claim that was forfeited as a matter of law by missing the filing deadline. Mont. Code Ann. § 85-2-226 (establishing conclusive presumption of abandonment of for claims not timely filed); *In re Climbing Arrow Ranch*, Case 41F-A19, 2019 Mont. Water LEXIS 1 (Mar. 6, 2019). The implied claim process also cannot be used to expand the elements of a statement of claim. *In re Eliasson Ranch Company*, Order Amending and Adopting Master's Report, Case 40A-115, 2004 Mont. Water LEXIS 2, *6 (Jun. 28, 2004) ("*Eliasson*").

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. For claim 43B 190470-00, the Preliminary Decree states that the volume is 9,120.00 AC-FT. The volume should be 36.78 AC-FT. The volume issue remark should be removed as addressed and resolved.

The Preliminary Decree also includes the following notice remarks:

THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

POINT OF DIVERSION AND RESERVOIR DATA WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE

REMARK WILL BE REMOVED FROM THE CLAIM.

CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

These remarks should be removed as having served their notice purposes.

2. For claim 43B 190471-00, the Preliminary Decree states that the volume is 9,102.00 AC-FT. The volume should be 47.78 AC-FT. The volume issue remark should be removed as addressed and resolved

The Preliminary Decree also includes the following notice remarks:

THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

POINT OF DIVERSION AND RESERVOIR RECORD WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

CLAIMED VOLUME EXCEEDS CAPACITY OF RESERVOIR PLUS EVAPORATIVE LOSSES. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

These remarks should be removed as having served their notice purposes.

3. For claim 43B 190478-00, a review of the Statement of Claim and its attachments – in particular the marked map and the David W. DePuy Affidavit Supporting Filing Under Use Doctrine - shows that one of the claimed points of diversion is on a source different than the source claimed. Although all the sources marked on the map are in close proximity, one is actually tributary to Trail Creek rather than part of the Eightmile Creek system. Statement of Claim 43B 190478-00 itself is proof of historical use corroborating the requested implied claim.

Claim 43B 190478-00 should be used for the Eightmile Creek and its tributaries appropriation. Implied claim 43B 30160047 should be generated for the unnamed tributary of Trail Creek appropriation.

4. For claim 43B 190478-00, the point of diversion and place of use include section 28, T4S, R8E, PARK. This point of diversion and place of use should be removed. The issue remark should be removed as addressed and resolved.

The Preliminary Decree also includes the following notice remark:

POINT OF DIVERSION AND PLACE OF USE WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

This notice remark should be removed as having served its notice purpose.

5. For implied claim 43B 30160047, the elements should be the same as 43B 194078-00 except a) the source name should be UNNAMED TRIBUTARY OF TRAIL CREEK; b) the source name remark concerning unnamed tributaries of Eightmile Creek should not be included; c) the point of diversion should be section 28, T4S, R8E, PARK, and d) the place of use should be section 28, T4S, R8E, PARK.

CONCLUSIONS OF LAW

1. The information provided by the DNRC Memorandum and the Status Reports is sufficient to address and resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

2. Statement of Claim 43B 190478-00 and its attachments plus the DNRC Memorandum and the Status Reports are sufficient to generate an implied claim. The requirements for generating an implied as specified in Case 41P-108, 2019 Mont. Water LEXIS *8, have been met.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin and generate implied claim 43B 30160047. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service Via Electronic Mail:

Ryan K. Mattick
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
office@cmrlawmt.com

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190470-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: FEBRUARY 14, 1967

Type of Historical Right: FILED

Purpose (use): FISH AND WILDLIFE

Flow Rate: 5,610.00 GPM

Volume: 36.78 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: EIGHTMILE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESWSW	33	4S	8E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SESWSW	32	4S	8E	PARK

Diversion to Reservoir: DIVERSION # 1

Dam Height: 13.00 FEET

Depth: 10.00 FEET

Surface Area: 2.00 ACRES

Capacity: 8.00 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SESWSW	32	4S	8E	PARK

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190471-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: FEBRUARY 14, 1967

Type of Historical Right: FILED

Purpose (use): FISH AND WILDLIFE

Flow Rate: 5,610.00 GPM

Volume: 47.78 AC-FT

THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: EIGHTMILE CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSWSW	33	4S	8E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSWSW	32	4S	8E	PARK

Diversion to Reservoir: DIVERSION # 1

Dam Height: 13.00 FEET

Depth: 10.00 FEET

Surface Area: 2.19 ACRES

Capacity: 8.76 ACRE-FEET

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWSWSW	32	4S	8E	PARK

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 190478-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: EIGHTMILE CREEK PV RANCH LLC
8111 WESTCHESTER DR STE 900
DALLAS, TX 75225 6146

Priority Date: JANUARY 1, 1906

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: EIGHTMILE CREEK

Source Type: SURFACE WATER

THE SOURCE INCLUDES UNNAMED TRIBUTARIES OF EIGHTMILE CREEK.

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		S2S2	33	4S	8E	PARK
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
2		S2	31	4S	8E	PARK
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
3			32	4S	8E	PARK
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
4		W2W2	34	4S	8E	PARK
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			S2S2	33	4S	8E	PARK
2			S2	31	4S	8E	PARK
3				32	4S	8E	PARK

4	W2W2	34	4S	8E	PARK
---	------	----	----	----	------

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 30160047 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: KENDRICK R WILSON III
143 EIGHT MILE CREEK
LIVINGSTON, MT 59047 8807

LINDA B WILSON
143 EIGHT MILE CREEK
LIVINGSTON, MT 59047 8807

Priority Date: JANUARY 1, 1906

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: UNNAMED TRIBUTARY OF TRAIL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			28	4S	8E	PARK

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				28	4S	8E	PARK